No. 6945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEONARD R. KING,
(Plaintiff) Appellant,

vs.

SIX COMPANIES, INC. (a corporation), and H. S. ANDERSON and W. S. ANDERSON, copartners, doing business under the firm name and style of Anderson Boarding and Supply Company,
(Defendants) Appellees.

BRIEF FOR APPELLEES

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STATEMENT OF FACTS.

The appellee, Six Companies Incorporated, is the general contractor for the construction of the Hoover Dam, popularly known as the Boulder Dam, for the United States Government. (Tr. pp. 8, 9.)

The appellees, H. S. Anderson and W. S. Anderson, copartners doing business under the firm name of Anderson Boarding and Supply Company, are sub-

contractors in connection with boarding and lodging employees at said project. (Tr. p. 9.)

The appellant, Leonard A. King, while seeking employment at said project in the summer of 1931, resorted to a boiler on said premises to dry his clothes and was injured when the boiler exploded. In his complaint he sought damages for $10,333.50. (Tr. p. 25.)

The District Court sustained a special demurrer of the defendant corporation, and a general demurrer of the defendant copartners, and plaintiff having failed to amend, judgment was entered in favor of such defendants. (Tr. pp. 32, 33.)

The present brief is filed jointly by the defendants as appellees.

STATEMENT OF ISSUES.

The brief for appellant is unusually prolix in view of the simple questions involved, and the appellees feel that no useful purpose can be served by answering the various arguments with minuteness of detail or by minutely distinguishing the various citations of appellant. For the purpose of brevity a simple independent presentation has been adopted.

Appellant seeks to restrict the scope of the review on appeal (Bf. App. p. 3), but is under a misconception as to the proper scope of such review. It is the general rule, of course, that in reviewing

an order sustaining a demurrer an appellate court is not restricted to the grounds upon which the action of the lower court is bottomed, but is free to consider each specified ground of demurrer, and if the demurrer was well taken on any ground the judgment below must be affirmed. (1 *Bancroft's Code Pleading,* p. 219; 4 *Corpus Juris,* p. 1132; *Burke v. Maguire,* 154 Cal. 456, 461; *Davie v. Board of Regents,* 66 Cal. App. 693, 702.)

In the present case, therefore, the defendants are entitled to a consideration of each ground of their respective demurrers, and the appellant cannot restrict the review by merely selecting such grounds of demurrer as he chooses to argue. Hence the questions on this appeal become the following:

(1) Was the complaint vulnerable to general demurrer?

(2) Was the complaint vulnerable to the special demurrer?

ARGUMENT.

(1)

THE COMPLAINT WAS VULNERABLE TO GENERAL DEMURRER FOR THE REASON THAT IT FAILED TO STATE A CAUSE OF ACTION AGAINST THE DEFENDANTS OR ANY DEFENDANT.

The first essential inquiry consists in determining the status of the plaintiff at the time he was injured. If the pleaded facts establish his status as that of invitee, then the complaint states a cause of action; but

if the pleaded facts establish his status as that of licensee, then the complaint does not state a cause of action.

It is undeniable that *to an invitee* the defendants would owe the duty of ordinary care and would be legally responsible for negligence in such respect. And it is equally certain that *to a licensee* the defendants would merely owe the duty of refraining from wantonly or wilfully injuring him, and would not be legally responsible for the acts or omissions charged in the complaint. It is true that paragraphs XIX and XX of the complaint under review (Tr. pp. 18-20) purport to state the various "duties" of the defendants; but under settled rules of pleading the conclusions of the pleader respecting the "duties" of the defendants must be disregarded in ascertaining their duties at law and in testing the sufficiency of the complaint. (*Whitten v. Nevada Power, Light & Water Co.,* 132 F. 782, 783, 784; 45 *Corpus Juris,* pp. 1061, 1062.)

In ascertaining the duties of the defendants we need not follow the appellant into the discussion as to whether the plaintiff, as a potential employee, was on the premises by invitation. The determinative question must be: *Do the pleaded facts show that he was at the boiler on said premises by the invitation of the defendants?*

The controlling law finds expression in *Peebles v. Exchange Bld. Co.,* 15 F. (2d) 255, 257, where the Circuit Court of Appeals for the Sixth Circuit said:

> "The declarations allege that she was on the defendant's premises by invitation. But this is not sufficient. She must have been where she was when she fell, by such invitation. If in being there she was a licensee or trespasser; no recovery can be had. Licensees must take the premises as they find them. The owner thereof is not bound to care for their safety, otherwise than to refrain from setting a trap for them and other active negligence."

The complaint under review expressly alleged that the plaintiff was injured by an explosion at the boiler (Tr. p. 17), and that plaintiff "went to said boiler to dry his clothes from the heat of said boiler, and asked permission so to do, of these defendants, which was immediately given him." (Tr. p. 16.) And such allegation is manifestly the equivalent of an allegation that plaintiff was a licensee at the boiler when injured.

In *Branan v. Wimsatt,* 298 F. 833, 837, (certiorari denied, memorandum, 265 U. S. 591, 44 S. Ct. 639, 68 L. Ed. 1195), it was said:

> "A permission, whether express or implied, is not an invitation to enter or use, and establishes no higher relation than that of mere licensor and licensee."

In *Herzog v. Hemphill,* 7 Cal. App. 116, 118, 119, in which the opinion was written by Associate Justice Kerrigan, now District Judge Kerrigan, the court said:

> "It is a well-settled rule of law that the owner or occupier of lands or buildings who, by invitation

> express or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe, but he assumes no duty to one who is on his premises by permission only and as a mere licensee, except that while on the premises no wanton or willful injury shall be inflicted upon him." (p. 118.)
>
> "Mere permission, or a habit, however, of an owner of allowing people to enter and use a certain portion of his premises is indicative of a license merely, and not an invitation." (p. 119.)

And in *State Compensation Ins. Fund v. Allen,* 104 Cal. App. 400, 410, it was said:

> "The doctrine is well established that except for wilful and wanton injury, the owner or one in control of property is not liable for injuries sustained by a mere licensee or trespasser."

At page 409 of the last cited authority the court referred to the fact that the injured person had not asked for "permission", and at page 40 of his brief herein the appellant seizes upon such reference and distorts it into the claim that the *Allen* case is authority for the rule that permission is equivalent to invitation. But appellant was unmindful that the court later on at page 411 cited with approval the following language from *Bottum's Administrator v. Hawks,* 84 Vt. 370, 79 Atl. 858, 864:

> "Neither silence, acquiescence, nor permission * * * standing alone, is sufficient to establish an invitation. A license may thus be created, but not an invitation."

In the complaint under review it was not alleged that plaintiff was expressly invited to dry his clothes at the boiler, and the allegations of the complaint destroy any possible claim that plaintiff was impliedly invited in such respect. We have in mind the allegations of paragraph VIII of the complaint (Tr. p. 11) to the effect that the summer of 1931 was unusually hot, that the temperature often exceeded 120 degrees Fahrenheit, that men were overcome with heat and forced to quit their work on account of the heat, and the allegations of paragraph XI of the complaint (Tr. pp. 13, 14) to the effect that the boiler was in operation generating steam. No rational view of such allegations could conclude that an invitation to potential employees to remain "about the camps and operations" of the defendants under conditions of such excessive heat would carry with it the implied invitation to become further over-heated by resorting to a boiler in operation and generating steam. "But when it was made to appear," said the court in *Powers v. Raymond,* 197 Cal. 126, 131, "that the occupancy and use of the portion of the premises on which the plaintiff was injured could not under any rational view of the evidence be within the scope of the invitation she became a mere licensee to whom the defendant owed no duty except to abstain from wilful or wanton injury."

Plainly, the pleaded facts establish beyond controversy that plaintiff occupied the status of licensee at the time he was injured at the boiler.

The next determinative question must be: *Do the pleaded facts show that the defendants were guilty of wilful or wanton injury to the plaintiff?*

The brief for appellant glosses over this question by asserting the following at pages 42 and 43:

> "We do not, however, deem it necessary to go into this field of the law, for we respectfully submit that this complaint directly charges active negligence in the installation and operation of this boiler. (Tr. pp. 19, 20, 21, 22.) * * * We therefore dismiss the thought."

According to the allegations of paragraph XXI of the complaint (Tr. p. 21) the negligence charged existed at the time plaintiff resorted to the boiler, and consisted of acts of omission rather than acts of commission. Thus it was alleged that the boiler was not enclosed from the wind; that it was not provided with a smokestack of sufficient height to insure an ordinary draft of air through the boiler under ordinary conditions; that the amount of fuel was not properly regulated; that the flues were not clean or free from soot and carbon; that the openings in the wall of the fire box were not kept closed; that sufficient draft of air through the fire box to carry off the gases was not provided; and that a competent man was not kept constantly present at and in charge of the boiler.

None of these acts was charged as wilful or wanton, and none of these acts was active negligence. What constitutes active negligence and the law relating

thereto as affecting licensees is copiously annotated in 49 A. L. R. 778.

In *Rhode v. Duff,* 208 F. 115, 117, 118, the Circuit Court of Appeals for the Eighth Circuit said:

> "The court below directed a verdict for the defendant upon the ground that:
>
> 'Mr. Rhode at the time he was in this place of business was there by permission as a licensee, and that the defendant owed no duty to him to change his arrangements in his place of business with regard to this doorway and the location of the water-closet and the lights maintained there. If it was satisfactory to the defendant, it served his purpose, and then the plaintiff was bound to take the place as he found it.'
>
> We think this was a correct statement of the law under the evidence produced, and that there was no error in directing a verdict for the defendant."

And in *Peebles v. Exchange Bld. Co.,* supra, the court said at page 257:

> "Licensees must take the premises as they find them."

Appellant finally resorts to the doctrine of last clear chance and claims that the pleaded facts call for an application of that doctrine. (Bf. App. p. 43, et seq.)

In commenting on the doctrine the court in *Darling v. Pacific Electric Ry. Co.,* 197 Cal. 702, 707, said:

> "The elements of the doctrine of last clear chance, which must be present in any given case in order to warrant the invocation of that doctrine are these: (1) That the plaintiff has been negligent; (2) That as a result thereof she was present in a situation of danger from which she could not escape by the exercise of ordinary care; (3) That the defendant was aware of her dangerous situation and realized, or ought to have realized, her inability to escape therefrom; (4) That the defendant then had a clear chance to avoid injuring her by the exercise of ordinary care; (5) That the defendant failed to avoid the accident by the use of ordinary care."

The insufficiency of the pleading to bring the case within the doctrine is apparent upon the most cursory reading. It will suffice to say, however, that the complaint under review *carefully refrained from alleging that defendants were aware that plaintiff was in a dangerous situation.* It is true that in paragraph XVI (Tr. pp. 16, 17) it was alleged as follows:

> "That plaintiff took a position at the side of said boiler in the lee of the wind * * * and that his said position was a dangerous position, and that the danger thereof was well known to defendants but was unknown to plaintiff."

While the foregoing measures up to an allegation that defendants knew that such position was dangerous, *it falls short of an allegation that defendants were aware that plaintiff was in such position.* And

from paragraph XXIII of the complaint (Tr. p. 22) it affirmatively appears that defendants were not aware that plaintiff was in such position. It was there alleged:

> "That at the time of the injury and for some little time immediately prior thereto, neither of the defendants, onr any employee of any of said defendants were present at said boiler."

There is therefore no room under the complaint in this action for invoking the doctrine of the last clear chance.

It is manifest without further argument that the complaint was vulnerable to general demurrer for the reason that it failed to state a cause of action against the defendants or any defendant, and that the judgment should be affirmed.

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(2)

THE COMPLAINT WAS VULNERABLE TO SPECIAL DEMURRER ON THE GROUND OF UNCERTAINTY.

It is a familiar rule of pleading that the purpose of a complaint is to inform the opposite party of the *facts* upon which the pleader relies as constituting his action. (*Santa Rosa Bank v. Paxton,* 149 Cal. 195, 197.) That uncertainty is a well established ground of demurrer needs no citation of authority. (*Martin v. Bank of San Jose,* 98 Cal. App. 390, 399.)

The demurrers of the respective defendants appear in the Transcript at pages 26 to 30, and each defendant assigned the following grounds of uncertainty:

> (a) That it could not be ascertained which of the defendants gave plaintiff permission to resort to the boiler.
>
> (b) That it could not be ascertained wherein the position taken by plaintiff at the boiler was dangerous.

(a) The complaint blanketed all defendants under the allegation that they gave plaintiff permission to resort to the boiler. When the lower court held that no cause of action was stated against the defendant copartners, it had no alternative but to sustain this ground of special demurrer as to the defendant corporation. Assuming that permission implies invitation as the lower court must have assumed,—and we deny that such is the law,—it then became necessary to remove the blanket and require the plaintiff to allege that the defendant corporation gave such permission. Manifestly, permission by the defendant copartners would not bind the defendant corporation, and manifestly the complaint was uncertain because it left the inference that such permission may have been given by the defendant copartners only. According to the view adopted by the lower court there was no alternative but to sustain the special demurrer of the defendant corporation on this ground.

(b) The complaint alleged that plaintiff took a "dangerous" position at the side of the boiler. (Tr. pp. 16, 17.) This was merely the conclusion of the pleader, and under settled rules of pleadings defendants were entitled to allegations *of the facts*. Clearly, the complaint was defective in this respect and the demurrers on the ground of uncertainty should have been sustained in such respect.

CONCLUSION.

It is therefore respectfully submitted that the judgment appealed from should be affirmed.

Dated, San Francisco,
January 10, 1933.

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